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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JESUS C.,

Petitioner,

v.

THE SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondent;

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Real Party in Interest.

B294832

(Los Angeles County
Super. Ct. No. DK16616A)

ORIGINAL PROCEEDINGS in mandate. Pete Navarro,
Judge. Petition denied.

Law Office of Martin Lee, Bernadette Reyes and Heather
Rodriguez for Petitioner.

No appearance for Respondent.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, Jessica S. Mitchell, Deputy County Counsel, for Real Party in Interest.

INTRODUCTION

J.C. was about nine and a half years old when he was detained and removed from his mother's custody. At that time, he had not seen his father Jesus C. in years. Father knew of this dependency case by not later than four months after J.C. was detained and placed in foster care. Father did not visit J.C. until almost a year and a half after J.C. had been placed in foster care, on J.C.'s 11th birthday. Father arrived three and a half hours late, a half hour before the scheduled end of the visit. Over the course of the next 10 months, father had two more visits with J.C.

The 18-month review hearing was continued several times between March and December 2018. Father made his first appearance in court on March 20, almost two years after J.C. had been placed with a prospective adoptive family. Between July and December 21, father had a total of six more visits with J.C. When the 18-month review hearing was finally held on December 21, the juvenile court found J.C. could not safely be returned to the custody of father. The juvenile court terminated reunification services for father and scheduled a selection and implementation hearing. (Welf. & Inst. Code, § 366.26.)¹

Father petitions for extraordinary relief, arguing that the juvenile court wrongly failed to: (1) appoint him counsel; and

¹ All further undesignated statutory references are to the Welfare and Institutions Code.

(2) further continue the 18-month review hearing. (Cal. Rules of Court, rule 8.452.) We deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

On April 5, 2016, when J.C. was about nine and a half years old and his half brother J.S. was one year old, the Los Angeles County Department of Children and Family Services (Department) received a referral alleging that their mother had physically abused J.S. (This petition only concerns the juvenile court's orders regarding J.C., as J.S. has a different father.) On April 15, 2016, the juvenile court granted a removal warrant to detain both children from their mother. The Department then filed a section 300 petition in the juvenile court alleging that mother had physically abused the children and had supervised them while under the influence of alcohol, and that J.S.'s father had failed to protect his child. J.C.'s father, who filed this petition, is nonoffending.

The juvenile court ordered the children to be detained in foster care. The court held in abeyance any paternity findings until the Department did due diligence on the fathers. Mother reported that father had not had contact with her or with J.C. since J.C. was about two years old and that she did not know where father was or how to reach him.

About four months later, on August 9, 2016, father contacted the Department and spoke with a social worker. He said that he had lived with J.C.'s mother about nine years ago and had visited J.C. about eight months ago. Father told the social worker that he was living with paternal grandmother in Los Angeles and he provided his address and cell phone number.

A Department investigator spoke to father by telephone the next day. Father said that he wanted custody of J.C., confirmed his

address, asked to have an attorney appointed to represent him, and said that he would attend the upcoming August 15, 2016 hearing. The Department reported this information to the juvenile court.

Father did not attend the August 15 hearing. The court found him to be J.C.'s presumed father and ordered family reunification services for him consisting solely of monitored visits with J.C.

Two days after the hearing (the first of many at which father failed to appear), a Department investigator called father and requested paternal grandmother's contact information to discuss possible placement of J.C. in her home. Father declined to share her contact information and instead said that he would give the investigator's number to paternal grandmother so that she could contact the Department if she wanted to do so.

Father also told the investigator that he would not be able to care for J.C. due to his diabetes and housing situation. Father said he would contact the Department later. As of the next hearing on August 30, 2016, neither father nor paternal grandmother had contacted the Department.

Father called the Department in September 2016 and left a message requesting visits with J.C. The social worker returned the call and left a message with her work and cell phone numbers and the foster agency social worker's contact information to schedule visits. The social worker also asked J.C. if he wanted to visit his father. J.C. shrugged and said, "yeah, why not." But he expressed doubt that father would visit him, saying that he had not seen father in two years and that father had other children he cared for more. When father returned the social worker's call, he said he was busy with work and would call again when he could arrange visits.

Father did not call again until a month later. He again expressed an interest in visiting J.C., but again failed to follow

through and arrange visits with any of the social workers. He called again the next month, but continued to be evasive about his availability for visits. During this time, the Department contacted father several times to try to schedule a home assessment. Father said he would contact the social worker when he was available. He cited his busy work schedule and said that he often traveled to Texas for a couple of months at a time for work.

Father met with the social worker at the Department's office on November 29, 2016. The social worker gave father a copy of the August 15 minute order granting him monitored visitation, which the court already had served on father by mail. Father said that he would contact the foster agency social worker to set up visits. When reminded that the Department would need to assess his home, father said he would contact the social worker when he was available.

Father did not appear at the six-month review hearing on December 20, 2016. The Department expressed concern about father's failure to keep in contact with J.C., to provide the Department with his work schedule despite repeated assurances that he would do so, and to make himself available for a home assessment. The Department also reported that J.C. had adjusted well to his foster placement and was doing well in school.

Between the December 2016 hearing and the 12-month review hearing in June 2017, the social worker tried to reach father by telephone several times to arrange visits with J.C. During this time, J.C. appeared comfortable with his foster parents, was happy to be living with J.S., liked and was doing well in school, took karate classes, and received weekly individual counseling. Father did not visit J.C. or allow a home assessment during this six month period.

In September 2017, almost a year and a half after J.C. had been detained, father requested a visit on J.C.'s birthday. The Department arranged for a monitored visit on J.C.'s birthday from 1:00 to 5:00 p.m. Father did not arrive until 4:30 p.m. The social worker had repeatedly tried to call him while they were waiting. When father arrived, he explained that he had fallen off a forklift at work. During the visit, father acted appropriately with J.C. and seemed interested in and affectionate with him. Father told the social worker that he had not seen J.C. in years and missed him. The social worker reminded him that he could have weekly visits, but father said his work schedule was busy and varied. The social worker encouraged father to attend the next hearing on September 20, 2017.

But again he did not attend the hearing. Between this hearing and the initial 18-month review hearing on March 20, 2018, the Department social worker continued to try, unsuccessfully, to reach father by telephone to arrange visits. The foster agency arranged for a monitored visit on December 26, 2017, but father did not show up or cancel the visit.

In the meantime, J.C. continued to do well in his foster placement and in school and continued his weekly individual therapy and karate classes. J.C. reported that, should he be unable to reunify with his mother, he would want to stay with his foster mother. He said that contact with father had been limited and that he believed his father did not really care about him because he had not continued a relationship.

The 18-month review hearing on March 20, 2018, almost two years after J.C. had been detained, was the first hearing father attended. The court appointed counsel for father. The court then

convened and continued the 18-month review hearing multiple times until December 21, 2018.

Father attended one of the continued hearings on July 19, 2018. By that point, father had visited with J.C. three times over the entire pendency of the proceedings. He told the court he had problems arranging visitation because he does not drive and that he was only offered visitation during his work hours.

A week after the July 19 hearing, father called the Department social worker to ask how to arrange visits with J.C. She gave father the contact information for the foster agency social worker, who could arrange monitored visits. Father requested weekend visits and identified paternal aunt as a weekend monitor. Father then had monitored visits with J.C. at the foster agency on two consecutive Tuesdays, July 31 and August 7, 2018. J.C. appeared happy and excited during these visits.

After a September 24, 2018 hearing, father arranged monitored visits at the foster agency on three consecutive Mondays. Each week father tried to change the schedule, but he did attend the weekly visits. J.C. told the Department social worker that he was glad father was visiting him and that he had a great time during the visits, and asked to live with father. Father continued to tell the Department that his work schedule made him unavailable for a home assessment.

On October 2, 2018, the court ordered the Department to assess father's home. The social worker called father four times before the next hearing on November 20, 2018, but father did not return the calls or otherwise make himself available for the assessment.

By the November 2018 hearing, father had made arrangements to reschedule his visits for Sundays, but he did not

have any more visits or phone calls with J.C. J.C. was disappointed that father had stopped contacting him and expressed interest in living with foster mother permanently. He said that he liked the stability of living with her and that he felt safe and well cared-for with her.

During the November 2018 hearing, the Department argued that the case was well past the 18-month stage and thus no further reunification services were available to father. J.C.'s counsel agreed, but emphasized that J.C. wanted a relationship with his father.

Father testified that he had not been visiting on Sundays because his sister's work schedule had changed and other possible monitors had not yet been screened. He also said that he tried to call his son three times during appointed telephonic visitation time, but the foster mother did not answer the phone and he did not keep calling because he did not want to get in trouble. He also testified that the social worker does not return his calls.

In trying to set up a home assessment, father reminded the court of his work schedule. The court said: "You're just going to have to make time, sir. Your son is reaching out. He's begging for someone." Father said, but "I have to work. I have another kid that I need to support too. I have to pay rent, bills. I can get Tuesdays or Wednesdays off. . . ." The court ordered an assessment for a Tuesday or Wednesday. The court also authorized father's visits to be unmonitored.

At an agreed-upon time on November 27, 2018, the Department social worker arrived at father's home for the assessment and waited about 20 minutes for father to arrive. Father explained that he had not yet moved into the apartment because paternal uncle was still living in the bedroom that he would

be moving into. Father did not allow an assessment of the bedroom he would be living in, but did allow the social worker to observe the rest of the apartment, which was clean. The social worker explained that the assessment would not be complete until the bedroom could be assessed, and father said he would text the social worker when he moved in.

Father did not call to arrange visitation with J.C. until December 13, 2018, when he scheduled a visit for three days later. That day, the Department social worker met with J.C., who reported not having had any recent visits or phone calls with father. He said he would want to live with father if father would not drink so much and if he would continue to visit him consistently, which he had not. He reported being happy in his foster placement and still being interested in his foster mother adopting him. On December 18, 2018, the foster mother and J.C. both told the social worker that father appeared to be intoxicated during the December 16 visit.

The social worker texted father on December 18 to ask whether he had moved into the apartment yet. Father replied to the text, but did not answer the question and instead asked about visiting J.C. on Christmas Eve. The social worker texted father again the next day with the same question. As of December 21, the date of the final 18-month review hearing, father still had not said whether he had moved into the apartment.

The Department reported to the court about its inability to complete the home assessment, father's recent visit with J.C., and J.C.'s feelings about his foster placement in a last minute information that father's counsel received the day of the hearing. Father requested that the court continue the matter again so that he could call witnesses and cross-examine J.C. to rebut the claim that he had been intoxicated during a recent visit. His attorney

noted that father has “severe diabetes” and that he would need immediate medical attention if he were to drink any alcohol. She therefore argued that it was very unlikely that he was intoxicated during the recent visit. She opined that foster mother was influencing J.C. to make these statements.

The children’s attorney stated that she had independently received the same information from J.C. and his foster mother about father’s condition during the recent visit. Although she submitted on the recommendation, she also expressed her belief that uncontrolled diabetes can, at times, make a person appear to be intoxicated.

The Department reminded the court it had filed the petition on J.C. more than two and a half years earlier. The 18-month review hearing had been continued multiple times to allow father to become involved. “All he had to do was visit with the child consistently and allow the department to check out his housing.”

The juvenile court issued its ruling. The court said that it had “no reason to doubt [J.C.’s] expressions as contained in today’s last minute information. They pretty much appear to be consistent that he’s stable, he likes his school.” The court had “no reason to doubt his further expressions that he would like to live with his father if he didn’t drink so much and if he continued to visit him consistently.” The court acknowledged the testimony that father’s work schedule and other family obligations made visitation difficult. “The court understands that, but still the child is entitled to have his father make him a priority. . . . He’s not being made a priority.”

The court found by a preponderance of the evidence that returning J.C. to father’s physical custody “would create a substantial risk of detriment to his safety, protection, or physical and emotional well-being.” The court continued: “Father has failed

to consistently visit and remain in contact with his son for most of [J.C.'s] – well, all of [J.C.'s] life. Certainly most of [J.C.'s] life has been outside his father's roof. Reunification services are therefore terminated for the father as to [J.C.] The visitation schedule shall continue."

The court then spoke to the recent allegations that father was intoxicated during a visit. Despite the allegations, the court declined to change visitation from unmonitored to monitored, "on the condition that father is not under the influence of any intoxicating substance." The court denied the Department's request for weekly alcohol testing, ordering testing only if father appeared to be intoxicated at a visit. The court also authorized J.C. and his foster mother to terminate a visit if they thought father was impaired.

The juvenile court set a selection and implementation hearing. Father timely filed a notice of intent to file a writ petition. The present petition for extraordinary relief followed.

DISCUSSION

Father contends that the juvenile court erroneously delayed in appointing him counsel and should have further continued the 18-month review hearing to allow him to cross-examine J.C. and call other witnesses to rebut the allegations that he was intoxicated during a recent visit.

1. To the Extent There Was Any Delay In Appointing Counsel for Father, It Was Harmless.

The juvenile court generally is required to appoint counsel for a parent if: (1) it appears that the parent cannot afford to employ counsel, (2) the child has been placed in out-of-home care or the Department is recommending such a placement, and (3) the parent has "communicate[d] in some fashion his or her desire for

representation.” (§ 317, subd. (b); *In re Ebony W.* (1996) 47 Cal.App.4th 1643, 1647.)

A juvenile court’s failure to appoint counsel is subject to a harmless error analysis. (See, e.g., *In re J.P.* (2017) 15 Cal.App.5th 789, 797 [“The harmless error standard has long applied to an appellate court’s review of the denial of a parent’s statutory right to counsel.”].) Though the question is unresolved, we follow other authority where the court assumed, without deciding, “that the harmless beyond a reasonable doubt standard of review is applicable in this case, because it provides a more cautious approach in that if the error is harmless beyond a reasonable doubt it will also be harmless by clear and convincing evidence.” (*In re Esmeralda S.* (2008) 165 Cal.App.4th 84, 94.)

Father initially asked to have an attorney appointed to him in a phone conversation with the Department on August 10, 2016. The Department conveyed his request to the court in a last minute information report filed on August 15, 2016. But father never appeared at any hearing concerning his son until almost two years later. The first hearing father attended was on March 20, 2018 – the initial 18-month review hearing, at which the court appointed counsel to represent father.

Father contends we must vacate the dispositional and all subsequent findings because the delay in appointing counsel rendered him unable to be heard in the case and to report to the court difficulties in communicating with the social worker. We disagree. We see no trial court error in the delay in appointing counsel, and even assuming there were error, it was harmless beyond a reasonable doubt.

Throughout these lengthy proceedings, the only requirements imposed on father were that he visit his son and allow

the Department to assess his living situation. Father was not alleged to be an offending parent, and the court did not otherwise require him to participate in reunification services. Yet, from the time father first spoke to the Department about J.C. on August 9, 2016, until mid-June 2018 (almost two years later), father had only visited J.C. three times.

After the juvenile court appointed counsel on March 20, 2018, the proceedings continued for nine more months before the court terminated reunification services and set a selection and implementation hearing. Even during this nine-month period when father had counsel, father did not consistently visit J.C. or make his home fully available for assessment. Well into this nine-month period, the Department continued to urge father to visit J.C. and the court implored father: “Your son is reaching out. He’s begging for someone.” Father continued to make excuses about his busy work schedule and his other family obligations to explain why he could not consistently visit J.C. or make his home fully available for an assessment. Father’s excuse that the social worker did not return his calls is belied by the record.

We think responsibility for any delay in appointing counsel to represent father falls on his shoulders, and not on the court. Father’s claim of trial court error is meritless, and any error was harmless. By the time the juvenile court set a selection and implementation hearing, father had been represented by counsel for nine months. Father’s inconsistent visits with J.C. separated by significant gaps in time and his failure to make himself available for a full home assessment did not sufficiently change after the court appointed counsel.

**2. The Juvenile Court Did Not Err in Denying
Petitioner's Request for a Continuance.**

Father argues that the juvenile court committed reversible error in denying his request to further continue the 18-month review hearing to allow him to cross-examine J.C. and to call witnesses to rebut the allegation that father had been intoxicated during a recent visit.

“Parties to [dependency] proceedings have a due process right to confront and cross-examine witnesses, at least at the jurisdictional phase.” (*Ingrid E. v. Superior Court* (1999) 75 Cal.App.4th 751, 756-757, citations omitted.) “The essence of due process is fairness in the procedure employed; a meaningful hearing, one including the right to confront and cross-examine witnesses, is an essential aspect of that procedure.” (*Ibid.*) “But due process also is a flexible concept, whose application depends on the circumstances and the balancing of various factors.” (*Ibid.*) “The due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court.” (*Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138, 1147.)

We find that the juvenile court did not base its order setting a selection and implementation hearing on a finding that father had been intoxicated during the recent visit. The court based its order on father's failure to visit J.C. consistently, which was the only requirement the court had imposed on father. The court also noted that J.C. consistently said he was in a stable situation with his foster placement and was enjoying school.

While the court also addressed the allegations of intoxication during the recent visit, the court made no findings as to whether father was intoxicated. To the contrary, the court declined to restrict father's visitation by requiring a monitor and expressly left

open the possibility that father's symptoms were caused by his diabetes.

Father does not argue that the further continuance was necessary to render reunification services adequate, only that it was necessary to rebut allegations of intoxication. Because the court focused on father's failure consistently to visit J.C. and not on the allegation of intoxication, the proffered evidence would not have been of significant probative value to the issue before the court. The juvenile court did not commit reversible error in declining to continue the 18-month review hearing yet again.

DISPOSITION

The petition is denied. This opinion is final forthwith as to this court pursuant to rule 8.490(b)(2)(A) of the California Rules of Court. The temporary stay of the hearing scheduled pursuant to section 366.26 is hereby lifted.

GRIMES, Acting P. J.

WE CONCUR:

STRATTON, J.

WILEY, J.